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# Supreme Court of the United States

OCTOBER TERM, 1931—No. 185.

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,
Petitioners,

*vs.*

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,

*and*

EMIL BRUNO GUBE,
Respondents.

## BRIEF IN BEHALF OF PETITIONER.

### STATEMENT.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a decree affirming a final decree of the District Court for the Eastern District of Pennsylvania. The District Court's decree was entered in favor of the respondents in an injunction proceeding brought to suspend and set aside the order of Augustus P. Norton, Deputy Commissioner for the Third Compensation District of the United States. The order was made by the Deputy Commissioner under the provisions of the "Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908."

The commissioner did not write an opinion.

The opinion of the District Court in favor of the respondents is reported in 40 Fed. (2d) 530, R. 7 to 12. The printed opinion on reargument is not reported. It is printed in R. 12 to 14. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 48 Fed. (2d) 57, R. 24 to 30.

The decree of the Circuit Court of Appeals was filed on March 25, 1931. Certiorari was granted on October 19, 1931.

Jurisdiction of this court is invoked under Sec. 347 (a) Title 28, of U. S. Code.

## The Proceeding.

The action below was a statutory proceeding commenced under Sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908.

It reads as follows:

"Sec. 21 (a) A Compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and

processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

## The Facts.

Emil Bruno Gube, on February 17, 1928, while in the employ of the petitioner, Baltimore and Philadelphia Steamboat Co., sustained an injury to his left arm while he was working as a longshoreman on a vessel lying in navigable waters of the United States. R. 3, 5, 6. Gube filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, against his employer and the petitioner, Maryland Casualty Co., which was the insurance carrier for the employer. R. 3, 6.

After a hearing the Deputy Commissioner, Augustus P. Norton, respondent herein, made findings of fact and granted an award of compensation for 146 weeks at a certain rate. R. 5, 6.

This award was made against the petitioner, Baltimore and Philadelphia Steamboat Co., as the employer, and against the petitioner, Maryland Casualty Co., as the insurance carrier. R. 6.

Thereupon and in conformity with the method provided by Sec. 21 of said Act, petitioners filed a bill of complaint in the United States District Court for the Eastern District of Pennsylvania, seeking,

(a) To set aside the Deputy Commissioner's finding that the average weekly wage was $36.06, and to set aside his award based thereon of $24.04 per week; and

(b) To set aside the order for compensation for 146 weeks and to substitute therefor an order for compensation for only 125.6 weeks.

To this bill of complaint, answer was made by the respondent Gube, only. The Commissioner, Norton, against

whom the proceeding was also brought, did not file an answer. R. 4, 15.

The matter came on for hearing before Honorable O. B. Dickinson, District Judge, who filed an opinion sustaining the award of the Deputy Commissioner. A decree was entered dismissing the bill. R. 14. The original opinion is reported in 40 Fed. (2d) 530. R. 7 to 12. An opinion was also rendered on reargument but not reported. R. 12 to 14.

Thereafter petitioners appealed to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decree of the District Court. Its opinion is reported in 48 Fed. (2d) 57. R. 24-30.

The petitioners do not here seek to review that part of the decision of the court below which found that because of overtime the weekly wage was $36. The sole question on which review is asked is that dealing with the number of weeks for which compensation should run.

The Deputy Commissioner found that Gube was totally disabled for 34 weeks, and that he suffered a permanent partial disability amounting to 40% of the use of his arm. R. 6. These findings are not disputed.

## The Question Involved.

There is only a question of law involved. It is: under what provisions of Sec. 8 of said Longshoremen's and Harbor Workers' Compensation Act is compensation to be allowed for a temporary total disability (lasting 34 weeks) and permanent partial disability (amounting to 40%), both resulting from the same injury to respondent's arm; does the Act authorize first, an allowance for a temporary total disability of 34 weeks under Sec. 8 (b), and second, an allowance for a permanent partial disability of 40% of 280

(*i. e.* 314—34) weeks (under Sec. 8 (c) (1), (19) and (22)), making a total of 146 weeks; or does the Act prescribe that the allowance for the combined injuries shall be 40% of 314 weeks under Sec. 8 (c), (1), (19) and (22), or a total of 125.6 weeks?

### The Decisions Below.

Both the District Court and the Circuit Court of Appeals, upholding the award of the Commissioner, held that under the Longshoremen's and Harbor Workers' Compensation Act respondent was entitled to compensation for a temporary total disability for 34 weeks (Sec. 8, Subdiv. 6), and for a permanent partial disability of 40% of 280 weeks, being an allowance of 314 [under Sec. 8 (c) (1), (19) and (22)] less the 34 weeks allowed for temporary total disability (under Sec. 8 (b)), making the total award 146 weeks.

## ARGUMENT.

### POINT ONE.

THE COMPENSATION FOR THE COMBINED INJURIES SHOULD BE FOR 40% OF 314 WEEKS UNDER SEC. 8 (c), (1), (19), (22), OR 125.6 WEEKS.

As the injured party, respondent Gube, suffered a temporary total disability of thirty-four weeks, and a permanent partial disability of 40% of the use of his arm, his right to compensation is governed by the provisions of Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908. The question before this Court

is one of construction of the applicable provisions of that section. The provisions of Sec. 8 involved in the controversy are the following:

"Sec. 8. Compensation for disability shall be paid to the employee as follows:

* * * * * * *

"(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

* * * * * * *

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * * * *

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-

four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It is petitioner's contention that inasmuch as this is a case of temporary total disability and permanent partial disability, both resulting from the same injury, respondent's rights are governed by subsection (22) of Sec. 8 and the other provisions [(c), (1), (19)] of Sec. 8 therein referred to.

Subsection (22) expressly provides in such case (*i. e.*, of temporary total disability and permanent partial disability, both resulting from the same injury):

"* * * If the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; * * *."

Respondent's period of temporary total disability being 34 weeks, exceeded the aforementioned schedule by 2 weeks. These 2 weeks, then, were to be added to the compensation period provided in subdivision (c), which period for a lost arm was 312 weeks, making a total of 314 weeks. As the partial disability was only 40%, the total number of weeks allowable under the provisions of subsection (19) of subdivision (c) was 40% of 314 weeks, or 125.6 weeks.

It is, however, arguable that the 40% should first be taken of the 312 weeks, namely, 124.8 weeks, and the excess 2 weeks then added, making the total compensation period 126.8 weeks.

We respectfully submit that this is the proper construction of the statute, and the only one which can be given consistently with the second paragraph of subsection (22). The latter provides:

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger or toe where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

That is to say, if respondent's temporary total disability had not extended beyond 32 weeks his compensation would have been limited to 40% of the 312 weeks provided in subdivision (c), (1), (19), (22). This is exclusive because it applies to *any* case involving a loss or partial loss of a member, and *all* compensation is limited to the schedule in subdivision (c). An additional allowance for the period of temporary total disability could not be made.

As Congress saw fit to limit the period of compensation to 312 weeks in any case resulting in the loss or partial loss of the use of an arm where the temporary total disability did not extend beyond 32 weeks, then it cannot, we submit, be consistently argued that, because the temporary total disability extended 2 weeks beyond the scheduled 32 weeks (*i. e.*, to 34 weeks), the period of compensation should be enlarged, not merely by the additional 2 weeks but by 21.2 weeks, as has been done by the Commissioner and the lower courts.

It may be asserted by respondent that this fails to give full compensation for a temporary total disability during the period of its continuance.

From the provisions of subsection (22), it seems quite obvious that the framers of the legislation reasoned in this manner: they determined that 312 weeks was proper compensation for the loss of an arm, including a period of temporary total disability (commonly called the healing period) which they apparently assumed in the average case would not exceed 32 weeks. In allowing the 312 weeks compensation for permanent partial disability, they included in such allowance compensation for the healing period of 32 weeks. This by the second paragraph of subsection (22). However, the healing period might extend beyond the 32 weeks, and thus by the same principle they compensated for the additional period of temporary total disability by commensurately enlarging the compensation for permanent partial disability. They did this by adding the excess of the healing period over 32 weeks to the 312 weeks allowed for the permanent partial disability. In this way the period of total disability is consistently cared for.

Congress very evidently regarded this as doing adequate justice as it was formulating a scheme of compensation applicable to all the various types of cases that could arise. It is clear that Congress deemed the compensation prescribed in Subdivision (c) (1) (22) adequate for a permanent partial loss of an arm or use of an arm with a temporary total disability, where the period of temporary total disability did not exceed 32 weeks (Sub-division (c) (22)). Thus, if the construction for which petitioners contend can be said to fail to give full compensation for temporary total disability during the entire period of its continuance, then Congress failed to provide for it where the period did not

extend beyond 32 weeks. But it cannot be said that Congress failed, for the right to compensation is a grant by Congress. If the grant proves insufficient, Congress, and not the administrative officers or the courts, alone can correct this condition.

The construction for which petitioner contends is entirely consistent with the provisions of the second paragraph of Sub-section (22), because the excess period of temporary total disability over the scheduled 32 weeks (in the instant case 2 weeks) is added to the schedule period of Sub-division (c) and the allowance is based on the total. In this manner Congress has clearly compensated for the full period of temporary total disability and permanent partial disability resulting from the same injury. If this were not so, there would be no sound reason for directing that the excess period of temporary total disability be added to the time allowed in subdivision (c) (1) for the permanent partial disability. This is the only theory upon which such addition can be justified.

Simply because a total disability period happens to extend beyond 32 weeks (in case of a partial loss of an arm), why should it be thought that Congress intended to apply an entirely different principle of compensation than when the period was 32 week or less? It is not for us to question the adequacy of the compensation. Congress determined that and it should be presumed to have acted with entire consistency in formulating its scheme of compensation.

The construction for which petitioner contends has been sustained by two district courts and by the practice followed by the New York Compensation Commission in its administration of the New York Workmen's Compensation Act, from which the Longshoremen's and Harbor Workers' Compensation Act was very evidently patterned, because it closely follows the latter in its terms.

In *Texas Employers' Insurance Association* vs. *Sheppeard*, 32 F. (2d) 300, D. C. S. D. Texas, the District Court set aside the order of the Commissioner which was based upon a computation by the same method as adopted by the courts in the instant case. The Court said, at page 301:

"That plaintiff is right, and that the method pursued by the Commissioner was wholly arbitrary, and not only not supported by, but in the face of, the controlling section of the law, I think entirely plain."

Substantially the same question was involved in *Grays Harbor Stevedore Co., et al.* v. *Marshall, et al.*, 36 Fed. (2d) 814, defendant therein making practically the same contention as to the provisions of the statute which were applicable and the construction properly to be given them. The Court said:

"That the statute contemplates compensation for both temporary total and permanent partial disabilities is clear, but to be measured and computed as the statute directs is equally clear. It would seem that (22) sustains defendants' contention; * * *"

Awards under similar sections of New York Workmen's Compensation Laws have been computed in precisely the manner adopted by the courts in the last two mentioned cases. The following is a quotation from the New York State Department of Labor, Special Bulletin No. 161, issued in August, 1929, page 103. This is the official publication of the Industrial Board, which is authorized to administer the New York Act.

"In applying Subdivision 4-a of Sec. 15, the New York Department of Labor makes no distinction between total loss and partial loss. If an employee has lost 25 per cent of his hand, instead of the entire hand, the Department

adds to the 61 weeks representing the 25 per cent the number of weeks of temporary total disability in excess of 32 weeks; that is, if the temporary total disability lasts 45 weeks, the employee will receive 61 weeks plus 13 weeks, a total of 74 weeks. By contrast, in applying the identical provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act, the United States Employees' Compensation Commission (Opinion No. 34, January 3, 1929) does make a distinction between total loss and partial loss. In the above instance of loss of 25 per cent of the hand and 45 weeks temporary total disability, it subtracts the 45 weeks from 244 weeks, the schedule allowance for the entire hand, adds the 13 weeks excess and divides by 4, giving 53 weeks. To this it adds the 45 weeks, making a total compensation of 98 weeks as compared with the total of 74 awarded in New York."

This basis of compensation in a case of temporary total disability and permanent partial disability was not disturbed in *Eppenstein* vs. *Adams & Co.*, 224 A. D. 332, affd. 250 N. Y. 562.

Consistency only follows under the construction petitioners place upon the statute. It fails completely if it is to be given the construction, as the courts below did, by which an excess total disability period of two weeks results in adding 21.2 weeks to the period of compensation.

The court below has said, and its decision is based upon the theory, that the Act shows an intent of Congress to give an employee two types of compensation, one for temporary total disability and the other for permanent partial disability, even though they arise out of the same injury. Inasmuch as the two types of compensation are described in separate paragraphs it would follow from this premise that respondent, for example, should have received 34 full

weeks for his temporary total disability and 40% of 314 weeks for his permanent partial disability, or a total of 159.6 weeks. This, it is admitted, would compensate respondent twice for the period of 34 weeks. In order to avoid the double compensation to which it would have been driven by its premise, the court arbitrarily held that it would not give respondent the full compensation for his permanent partial disability. In other words it deducted from 314 weeks, which the statute [subdivision (c)] expressly allowed him, the 34 weeks for which he was being paid temporary total disability [subdivision (b)]. Instead, therefore, of giving him 40% of 314 weeks it gave him 40% of 280 weeks. The court said:

"As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a), (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent partial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each respectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

The significant part of the above quotation is the last four lines, viz.:

"where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

This is nothing less, we respectfully submit, than a statutory interpolation. There is nowhere in the Act any indication that the compensation for permanent partial disability shall be diminished from the periods set forth in the schedules. The Act (Subsection 22) provides only for *increasing* the schedules. Notwithstanding this the court has arbitrarily reduced the schedule compensation from 314 weeks to 280 weeks.

As pointed out above, this was done in order to avoid paying to respondent double compensation for the period during which he was totally disabled; that is, once under subdivision (b) and again under subdivision (c).

If, as the court maintained, Congress intended that respondent should have the two types of compensation, then he should have received double compensation. The fact that the court avoided this result indicates both that it was not Congress' intention to provide for double compensation, nor to give the two types of compensation in the one case.

If it was not the Congressional intent to give an injured employee double compensation (and no one suggests that it was the intent), then it follows that Congress did not intend to give an injured employee two types of compensation for the same injury. To give the two types of compensation for the same injury logically demands the payment of double compensation, unless the anomalous result reached by the court below is substituted for the plain words of the statute.

The true Congressional intent is revealed by comparing with respondent's case the results in cases where the dis-

ability is greater, and cases where the disability is less, than respondent had.

For instance, if respondent had lost his entire arm he would have had a permanent partial disability. The award to him would have been the full schedule loss of 312 weeks provided by subdivision (c) (1) plus the two weeks by which his total temporary disability exceeded the period of 32 weeks. It has never been suggested by anyone that any more than this amount should be given to a man who has completely lost his arm. Indeed, the Federal Compensation Commission, in its opinion on this section of the Act, has stated that that is just what such a man would receive. Opinion #34 of United States Employees' Compensation Commission January 3, 1929 reported in 1929, American Maritime Cases, page 100. This amounts to an admission that only one type of disability is compensable even though both types are present.

Again, assuming that respondent had been totally disabled only 32 weeks instead of 34, there can be no possible dispute that he would not have been entitled to anything other than 40% of 312 weeks under sub-section (c), (1), (19).

The only method by which the words of the statute may be fully respected is on the assumption that Congress intended that an injured man should receive one type of compensation and one only. This is the contention of the petitioner.

For the reasons herein stated, the courts below and the Commissioner erred, and the compensation for the combined injuries should be 125.6 weeks, *i. e.*, 40% of 314 weeks, under Sec. 8 (c), (1), (19) and (22).

## POINT TWO.

### The question involved is not moot.

It was contended below that since the employer paid the respondent the full amount awarded, the question raised by the employer and the insurance carrier was moot.

The Circuit Court of Appeals decided that the question was not moot. The reason which the court gave was that the insurance carrier, as surety, had a right to have the question finally determined so that its liability to the employer could be fixed.

Regardless of the rights between employer and insurance carrier, it is clear from Sec. 21 (b) of the Act that "any party in interest" has a right to bring the proceeding which was brought by the present petitioners.

Furthermore, it is plainly implied in Sec. 21 (b) that the proceeding may be maintained even though a stay of the payments is denied.

Inasmuch as under Sec. 18 of the Act (U. S. Code, Title 33, Sec. 918) the employer can be compelled to pay the judgment, and inasmuch as a stay is granted only where "irreparable damage" would ensue to the employer, it follows that Congress recognized and provided for the right to a review in proceedings such as the present one, even after the employee was paid.

## POINT THREE.

THE DECREE OF THE COURT BELOW SHOULD BE REVERSED.

We respectfully submit that the decree of the court below should be reversed and an award made of 125.6 weeks compensation.

Respectfully submitted,

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November 13, 1931.